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11  
12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA**  
14

15 DCD PARTNERS, LLC, et al.,

16  
17 Plaintiffs,

18 v.

19 TRANSAMERICA LIFE  
INSURANCE COMPANY, a  
20 corporation, et al.,

21  
22 Defendants.

Case No. 2:15-cv-03238-CAS-(AJWx)

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S  
MOTION IN LIMINE NUMBER 1  
TO EXCLUDE EXPERT OPINIONS  
NOT IN REPORTS**

Hon. Christina A. Snyder

Hearing Date: August 14, 2017  
Time: 11:00am

Trial: August 29, 2017  
Complaint Filed: March 18, 2015

1 Plaintiffs submit this Memorandum of Points and Authorities in Opposition  
2 to Defendant's Motion *in Limine* Number One (the "Motion").

### 3 ARGUMENTS AND AUTHORITIES

4 Federal Rule of Civil Procedure 26(e)(1) provides that a party must  
5 supplement an incomplete or incorrect expert report with additional information not  
6 previously known to the party by the time of pretrial disclosures.<sup>1</sup> Here,  
7 July 24, 2017. Pursuant to Rule 37(c)(1), if a party fails to timely disclose  
8 information, the information may be used at trial if the delay was substantially  
9 justified or harmless.<sup>2</sup> Moreover, even when neither justified nor harmless,  
10 untimely information may be used at trial if exclusion is tantamount to dismissal.<sup>3</sup>

11 Defendant makes three arguments to exclude Plaintiffs' experts'  
12 (the "Experts") testimony. First, that the disclosures are not timely. Second, that  
13 the disclosures offer new opinions. Third, that the disclosures prejudice Defendant.  
14 The Court should deny Defendant's motion for five reasons.

15 First, the Experts' supplemental reports were timely served. The  
16 supplemental reports, which encompass the information brought to the Court's  
17 attention in the Experts' Sworn Declarations in Opposition to Defendant's Motion  
18 for Summary Judgment on June 17, 2017, were served on July 24, 2017, the  
19 deadline for disclosure.<sup>4</sup> Thus, Defendant's motion should be denied.<sup>5</sup>

20 Defendant's brief disregards the disclosure deadline. Instead, Defendant

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21 <sup>1</sup> See *Wechsler v. Macke Int'l Trade, Inc.*, 221 F.R.D. 619, 623 (C.D. Cal.  
22 2004) (admitting supplemental report filed on deadline for pretrial disclosures).

23 <sup>2</sup> See e.g., *Perez v. First Am. Title Ins. Co.*, 810 F. Supp. 2d 986, 989  
(D. Ariz. 2011) (delay substantially justified by late production and court order).

24 <sup>3</sup> See e.g., *U.S. ex rel. O'Connell v. Chapman Univ.*, 245 F.R.D. 652, 655  
(C.D. Cal. 2007).

25 <sup>4</sup> See Declaration of Maxwell D. Herman ("Herman Decl."), ¶ 2; see also  
26 Supplemental Expert Report of Vincent J. Granieri, attached as Exhibit 3 to the  
27 Herman Decl.; Supplemental Expert Report of Robert S. Cauthen, attached as  
28 Exhibit 4 to the Herman Decl.

<sup>5</sup> See *Wechsler*, 221 F.R.D. at 623.

1 argues that Plaintiffs' supplemental reports are untimely because Plaintiffs failed to  
 2 "make any effort" to supplement after the October 5, 2016, expert report deadline.  
 3 Defendant conveniently ignores that the overwhelming majority of documentary  
 4 evidence in this case (573,006/719,173 documents) was withheld by Defendant  
 5 until after the December 16, 2016, discovery cut-off, and then only produced after  
 6 Magistrate Judge Wistrich twice-compelled Defendant to do so.<sup>6</sup> (ECF Nos. 129,  
 7 177). Defendant's productions continued until April 2017, despite document  
 8 requests having been served on May 5, 2016.<sup>7</sup> Defendant's dilatory conduct forced  
 9 Plaintiffs to postpone the majority of depositions until May and June 2017, as well.<sup>8</sup>

10 Further, as of the rebuttal report deadline of November 8, 2016, Defendant  
 11 had not produced a single email, spreadsheet or analysis to Plaintiffs, and produced  
 12 only a fraction of the total electronically-stored information in its possession on  
 13 December 3, 2016, at Judge Wistrich's behest.<sup>9</sup> (ECF No. 104). Prior to that date,  
 14 Defendant's productions consisted of Plaintiffs' policy forms and policy  
 15 information, documents to which Plaintiffs, as policyholders, are always entitled.<sup>10</sup>  
 16 As a result, the Experts explicitly reserved the right to supplement their initial  
 17 reports with subsequently obtained evidence.<sup>11</sup>

18 Due to Defendant's recalcitrance, the record still was not complete as of the  
 19 time Plaintiffs' Opposition to Summary Judgment was due. Plaintiffs had three  
 20 additional depositions scheduled, and a pending motion to de-designate privileged  
 21 documents.<sup>12</sup> Nevertheless, the Experts prepared sworn declarations identifying  
 22

23 <sup>6</sup> See Herman Decl., ¶ 3.

24 <sup>7</sup> Defendant produced 459,794 on March 17, 2017. See Herman Decl., ¶ 3.

25 <sup>8</sup> See Herman Decl., ¶ 4.

26 <sup>9</sup> See Herman Decl., ¶ 5.

27 <sup>10</sup> See *id.*

28 <sup>11</sup> See Initial Expert Report of Vincent J. Granieri, attached as Exhibit 1 to the Herman Decl., at 2; Initial Expert Report of Robert S. Cauthen, attached as Exhibit 2 to the Herman Decl., at 3-4; *Wechsler*, 221 F.R.D. 623.

<sup>12</sup> See Herman Decl., ¶ 6;

specific aspects of their initial opinions that were being supplemented with information obtained through discovery. Defendant cannot, by disregarding Court-ordered deadlines and the Federal Rules, preclude Plaintiffs from supplementing their reports by delaying production of crucial evidence.

Second, the Experts' supplemental reports do not proffer new opinions.<sup>13</sup> Defendant argues that Plaintiffs' expert Vincent J. Granieri "offers several new opinions." Namely, that: (a) "the MDR increase was not consistent with the TransValue policy terms;" (b) "the smallest appropriate policy class [for a monthly deduction increase was all TransValue simplified issue policies];" (c) Defendant's mortality study was inadequate; and, (d) "[Defendant] made misrepresentations in its marketing materials and illustrations." Defendant is mistaken.

Without the benefit of the majority of discovery in this matter, Mr. Granieri explicitly opined in his initial report: "[M]y opinion is that the April 2013 MD Increase was not consistent with the Policy terms."<sup>14</sup> He then elucidated why the increase was not consistent with the policy terms, noting, *inter alia*, that any increase must be "consistent for all similarly situated policies - that is, those that belong to the same class," and that, despite "not [having] been given the mortality study or studies that formed the basis for the increase," Defendant's study was likely inadequate in the absence of actuarial techniques such as confidence intervals.<sup>15</sup> This clearly encompasses alleged new opinions (a), (b) and (c). With regard to alleged new opinion (d), in his initial report, Mr. Granieri opined: "[T]he marketing of this program to Plaintiff's (sic) was misleading." Mr. Granieri specifically referenced illustrations.<sup>16</sup> Thus, Defendant's motion should be denied.

<sup>13</sup> See e.g., *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co.*, 769 F. Supp. 2d 269, 279 (S.D.N.Y. 2011).

<sup>14</sup> See Exhibit 1 to the Herman Decl., at 4.

<sup>15</sup> See *id.* at 5.

<sup>16</sup> See *id.* at 6.

Defendant also avers that Plaintiffs' expert Robert S. Cauthen proffers a new opinion concerning the meaning of "mortality." In his initial report, Mr. Cauthen opined that Defendant used an unsuitable product and underwriting for insureds affiliated with several foundations, including PIC, a mismatch highly likely to result in a monthly deduction increase for the class.<sup>17</sup> Subsequent discovery indicates that Defendant discriminatorily increased the monthly deductions for Plaintiffs based solely on PIC's mortality, and not the mortality of a class.<sup>18</sup> In light of that new information, it was necessary for Mr. Cauthen to supplement his report to indicate that his initial opinion assumed any increase due to mortality would be on a class basis (as would be consistent with the policy terms). Thus, the Experts do not proffer new opinions and Defendant's motion should be denied.

Third, even if the Court finds that the Experts' supplemental reports do proffer new opinions, and it should not, any alleged delay was substantially justified and harmless. As laid out, above, Defendant's chosen course of conduct throughout discovery, one of delay, obfuscation and obstinacy, is the direct cause of any allegedly untimely opinions.<sup>19</sup> In fact, the Experts continue to receive probative information spoliated by Defendant by way of NANM, Defendant's general agent, and only recently obtained the deposition of NANM employee Fred Albracht, the actuary who first proposed the cost of insurance increase to Defendant, on July 11, 2017.<sup>20</sup> Thus, any alleged delay was substantially justified.

In addition, any alleged delay did not result in harm. By choice, Defendant has yet to depose the Experts. Their depositions are currently set for August 8 and August 9, two weeks after service of the supplemental reports and nearly two

<sup>17</sup> See Exhibit 2 to the Herman Decl., at 8, 14.

<sup>18</sup> See Pl.s Opp. to Def.'s Mot. Summ. J. (ECF No. 243), at 11-14.

<sup>19</sup> See e.g., *Perez*, 810 F.Supp.2d at 989 (delay substantially justified where data produced after rebuttal report deadline, and 2 months after discovery order).

<sup>20</sup> See Herman Decl., ¶ 7.

1 months after the Experts' sworn declarations were filed.<sup>21</sup> Thus, Defendant will  
 2 have every opportunity to explore the Experts' alleged new opinions. In addition,  
 3 Defendant has been on notice of the Experts' alleged new opinions since  
 4 June 17, 2017, when the Experts filed the sworn declarations.

5 Fourth, if the Court finds that the supplemental reports offer new opinions,  
 6 Plaintiffs respectfully submit that lesser sanctions are appropriate where, as here,  
 7 exclusion is tantamount to dismissal.<sup>22</sup> The opinions Defendant identifies as "new"  
 8 in Mr. Granieri's supplement go to the heart of Plaintiffs' case (which is why they  
 9 were included in his initial report). Excluding related testimony by Mr. Granieri  
 10 leaves Plaintiffs unable or nearly unable to demonstrate Defendant's contractual  
 11 and tortious breaches, achieve remuneration for Plaintiffs, and preserve a program  
 12 directly supporting thousands of families and indirectly supporting thousands more.

13 Fifth, Defendant's caselaw is easily distinguishable,<sup>23</sup> and the instant facts  
 14 are analogous to those in *Wechsler v. Macke Intern. Trade, Inc.*, 221 F.R.D. 619  
 15 (2004), wherein this Court did not exclude expert testimony.

16 For the reasons set forth, Plaintiffs request that the Court deny the Motion.

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<sup>21</sup> See Herman Decl., ¶ 8.

18 <sup>22</sup> See e.g., *U.S. ex rel. O'Connell*, 245 F.R.D. at 655; see also *R & R Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1246 (9th Cir. 2012).

19 <sup>23</sup> See e.g., *Encompass Ins. Co. v. Berger*, 2014 WL 12597120 (C.D. Cal.  
 20 Aug. 12, 2014) (expert withheld new opinions until trial deposition despite no  
 21 discovery delays; testified a year previous that his opinions were complete); *Wong*  
 22 *v. Regents of Univ. of California*, 410 F.3d 1052 (9th Cir. 2005) (disability expert in  
 23 ADA lawsuit not disclosed until after defendant filed for summary judgment);  
 24 *Smartmetric, Inc. v. Mastercard Int'l, Inc.*, 2013 WL 12108250 (C.D. Cal. Oct. 2,  
 25 2013) (in patent case, where "treatises propose strictly ordered discovery," untimely  
 26 new opinion not justified because expert did not primarily rely on documents  
 27 unavailable prior to the expert disclosure deadline); *Estate of E.H. v. City of*  
 28 *Pasadena*, 2010 WL 11508333 (C.D. Cal. Mar. 16, 2010) (expert had already been  
 29 deposed and proffered no excuse for untimely supplement); *Jarritos, Inc. v. Reyes*,  
 30 345 F. App'x 215 (9th Cir. 2009) (initial report not served until after deadlines for  
 31 disclosure and expert discovery); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259  
 32 F.3d 1101 (9th Cir. 2001) (initial report served two years after the close of  
 33 discovery and 28 days prior to trial).

1 Dated: July 24, 2017

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